

DUANE MORRIS LLP

Gregory P. Gulia
John Dellaportas
Vanessa C. Hew
R. Terry Parker
1540 Broadway
New York, NY 10036
(212) 692-1000
Counsel for Defendants

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CAPITOL RECORDS, INC.; CAROLINE)	
RECORDS, INC.; EMI CHRISTIAN MUSIC)	
GROUP INC.; PRIORITY RECORDS LLC; VIRGIN)	CIVIL ACTION NO. 07-Civ. 9931
RECORDS AMERICA, INC.; BEECHWOOD)	(WHP)
MUSIC CORP.; COLGEMS-EMI MUSIC INC.; EMI)	ECF Case
APRIL MUSIC INC.; EMI BLACKWOOD MUSIC;)	
EMI FULL KEEL MUSIC; EMI GOLDEN TORCH)	
MUSIC CORP.; EMI LONGITUDE MUSIC; EMI)	
VIRGIN MUSIC, INC.; EMI VIRGIN SONGS, INC.,)	
EMI AL GALLICO MUSIC CORP., EMI ALGEE)	
MUSIC CORP., EMI FEIST CATALOG, INC., EMI)	DECLARATION OF
GOLD HORIZON CORP., EMI GROVE PARK)	MICHAEL ROBERTSON
MUSIC, INC., EMI HASTINGS CATALOG, INC.,)	IN OPPOSITION TO
EMI MILLS MUSIC, INC., EMI MILLER)	PLAINTIFFS' MOTION FOR
CATALOG, INC., EMI ROBBINS CATALOG,)	SUMMARY JUDGMENT
INC., EMI U CATALOG, INC., EMI UNART)	
CATALOG, INC., JOBETE MUSIC CO., INC.,)	
SCREEN GEMS-EMI MUSIC, INC., STONE)	
AGATE MUSIC, and STONE DIAMOND MUSIC,)	
)	
Plaintiffs,)	
v.)	
)	
MP3TUNES, LLC, and MICHAEL ROBERTSON,)	
)	
Defendants.)	

I, MICHAEL ROBERTSON, hereby declare:

1. I am the Chief Executive Officer of MP3tunes, Inc. ("MP3tunes"). I respectfully submit this declaration in opposition to Plaintiffs' Motion for Summary Judgment; specifically, to correct certain of Plaintiffs' more egregious factual misrepresentations.

2. Plaintiffs falsely allege that MP3tunes' executives sideloaded allegedly infringing files "in the scope of their employment" to "populate [Sideload.com] with content that would be attractive to users," Pl. Br. 14, based on their misunderstanding of an excerpt from an email exchange in which MP3tunes' Chief Technical Officer and I discussed populating Sideload.com with "artist café tracks." *See* Bart Dec. Ex. 56. The artist café program involved MP3tunes and certain artists whose music was for sale at the MP3tunes.com. These artists authorized certain songs for download at MP3tunes' websites to promote their albums which could also be purchased at MP3tunes.com. More broadly, and in any event, I have no knowledge that either I, or anyone else associated with MP3tunes, has ever uploaded or sideloaded into his or her locker any music file that infringes any of Plaintiffs' copyrights.

3. Plaintiffs also claim that MP3tunes has violated its agreement with Amazon.com to use cover art associated with certain songs at issue in this litigation. Tellingly, Amazon itself has never accused MP3tunes of any such violation, for the simple reason that MP3tunes is acting under license from, and indeed is generating considerable revenue for, Amazon.

4. As Plaintiffs admit, MP3tunes does have a license with Amazon.com which allows MP3tunes to "copy and display" artwork that is at issue in this litigation. This license is intended to facilitate the sale of music, as well as other products, at Amazon.com. When users at MP3tunes.com listen to a song that they have stored in their MP3tunes locker, cover art associated with that song appears on the MP3tunes' interface, which also links users to


Amazon.com where they can purchase related or recommended tracks. By this cover art function, MP3tunes has directed its users to Amazon.com on 20,472 occasions, resulting in 1,271 purchases. (Annexed hereto as Exhibit A is a true and correct copy of MP3tunes' Amazon Affiliate Report.) MP3tunes' use of cover art therefore is in compliance with MP3tunes' license agreement with Amazon.com, which allows for: the "display and/or public performance of certain video and static media content via datafeeds made available by Amazon" for the "sole[] purpose of facilitating referrals from [MP3tunes'] site to the Amazon Site." That is why Amazon, to date, has never notified MP3tunes that it believes MP3tunes' use of such cover art exceeds the scope of that agreement.¹

5. Lastly, I have viewed four video exhibits that Professor Horowitz submitted with his declaration in support of Plaintiffs' motion for summary judgment, wherein he purports to describe how the MP3tunes.com and Sideload.com services operate. In response, I have attached hereto, as DVD Exhibits 1-3, videos demonstrating how other search engines operate in a manner similar to Sideload.com and find the identical songs available for download which can be found by Sideload.com. DVD Exhibits 1-3 have been filed with the Clerk with the Court's permission

¹ I previously stated in my declaration in support of Defendants' Motion for Summary Judgment that MP3tunes' revenue comes solely from subscriptions to MP3tunes premium locker services. I forgot to mention that MP3tunes also gets revenue from Amazon.com. Since the beginning of the Amazon.com affiliate program, MP3tunes has received approximately \$607 in advertising revenue and \$10,068 in revenue as a percentage of Amazon.com music purchases made by MP3tunes' users.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: November 24, 2010
San Diego, California



Michael Robertson